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Supreme Court of the United States

October Term, 1957.

No. 880.

ALHAMBRA GOLD MINE CORPORATION, a corporation,
Appellant,

vs.

THE ALHAMBRA-SHUMWAY MINES, INC., a corporation,
Appellee.

Brief of Appellant in Opposition to Motion of Appellee to Dismiss or Affirm.

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Brief of Appellant in Opposition to Motion of Appellee to Dismiss or Affirm.

I.

The appellee has moved this Honorable Court to dismiss or affirm the judgment pursuant to the provisions of Rule 16 of the Supreme Court of the United States.

II.

The Grounds of the Motion to Dismiss or Affirm Are Without Merit.

The grounds for said motion as stated by appellee are that

> "such appeal is not within the jurisdiction of the Supreme Court in that a final judgment has not been entered in said action within the meaning of Judicial Code, Section 1237."

It is true that under the laws of the State of California, a reversal of a judgment of a trial court without direction has the effect of remanding the cause for a new trial and places the parties in the same position as if the case had never been tried.

Falkner v. Hendy, 107 Cal. 49, 54;

Central Savings Bank of Oakland v. Lake, 201 Cal. 438.

However, the rules of the Judicial Council of the State of California referring to remittiturs on conclusion of appeals to the District Court of Appeal and the Supreme Court, provide:

Rule 25

"(a) (ISSUANCE AND TRANSMISSION).

"A remittitur shall issue after the final determination of any appeal, or of any original proceeding in review in which an alternative writ or order to show cause has been issued. Unless otherwise ordered, the clerk of the Supreme Court shall issue the remittitur when a judgment of that court becomes final, and the clerk of a District Court of Appeal shall issue the remittitur 30 days, in civil cases and 15 days in criminal cases, after a judgment of that court becomes final therein. The remittitur shall be deemed issued on the clerk's entry thereof in the register, and shall be transmitted immediately with a certified copy of the opinion, to the lower court or tribunal."

It is the law in California, and has been affirmed in the decisions repeatedly, that after final determination by the Supreme Court or by the District Court of Appeal, of an appeal from a judgment of the Superior Court, in

which the judgment of the trial court is reversed, the decision of the Supreme Court or District Court of Appeal, although having the effect of remanding the case for retrial and placing the parties in the same position as if the case had never been tried in the Superior Court, is nevertheless final, conclusive, and binding upon all litigants and the lower court in all further proceedings including the retrial upon all points of law decided therein.

In support of its motion, Appellee cites *Gospel Army v. Los Angeles*, 331 U. S. 543, 67 S. Ct. 1428. Said case is authority for Appellant's position on this point. In the course of the opinion, it is said:

> "Upon a retrial, the decision of the Appellate Court becomes the law of the case upon the facts as then presented."

In the present case, the decision of the District Court of Appeal of the State of California, Third Appellate District, from which we appeal, provides in part as follows:

> "In view of the provisions of Section 23301 of the Revenue & Taxation Code, and the authorities hereinbefore cited, we believe that there is no escape from the conclusion that Respondent corporation *had no right to defend in the instant action, or even to participate therein during the time that its corporate rights were suspended.*" (Italics ours.)

Appellee has already contended in the lower court, in pressing a motion for Summary Judgment made after the decision of the District Court of Appeal from which we have appealed, that Appellant is bound by the decision of the District Court of Appeal determining that appellant "has no right to defend", and that such decision is

the "law of the case". (A stay of the hearing on such motion pending the determination of the United States Supreme Court of this appeal, has been granted.)

Appellant is further confronted with the provisions of Section 23305a of the Revenue and Taxation Code of the State of California, the pertinent provisions of which provide:

> "Upon the issuance of such certificate by the Franchise Tax Board the taxpayer therein named shall be reinstated, but such reinstatement shall be without prejudice to any action, defense or right which has accrued by reason of the original suspension or forfeiture . . . ."

The cases of *St. Louis Southwestern Railway Co. v. State of Arkansas*, 235 U. S. 350, 35 S. Ct. 366; and *Pullman Company v. Richardson*, 43 S. Ct. 366, 261 U. S. 330, cited by appellee, are not in point as they deal with the right of a state to tax a corporation, and the *right to defend an action* is not involved.

The case at bar is controlled by the due process clause of the Fourteenth Amendment which requires an opportunity to be heard.

Windsor v. McVeigh, 93 U. S. 274, 23 L. Ed. 914;

Hovey v. Elliott, 167 U. S. 409, 42 L. Ed. 215;

Pennoyer v. Neff, 95 U. S. 714;

McDonald v. Mabee, 243 U. S. 90;

Baker v. Baker, Eccles & Co., 242 U. S. 394; and

Grannis v. Ordean, 234 U. S. 385.

In *Hovey v. Elliott, supra,* it is said:

> "A denial to a party of the benefit of a notice would be in effect to deny that he is entitled to notice at all, and the sham and deceptive proceeding had better be omitted altogether. It would be like saying to a party, appear and you shall be heard; and when he has appeared, saying your appearance shall not be recognized, and you shall not be heard."

This is similar to the case at bar. Appellant corporation was served with process and when it came before the court and prevailed upon the merits (*The Alhambra-Shumway Mines*, a corporation *v. Alhambra Gold Mine Corporation*, a corporation, 155 A. C. A. 65, 317 P. 2d 649, Nov. 7, 1957), the judgment was reversed for the reason as given, that as a foreign corporation, its right to do intrastate business was forfeited for non payment of the franchise tax and therefore it could not defend an action brought against it to cancel its lease to mining property upon which it had expended over $150,000.00.

The federal question is so substantial that this Honorable Court should entertain jurisdiction and deny the motion of appellee to dismiss or affirm the judgment.

Respectfully submitted,

JEROME WEBER,

Attorney for Appellant.